

EXHIBIT “A”

WT

JOSEPH MURE JR. & ASSOCIATES
26 Court Street • Suite 2810 • Brooklyn, NY 11242

RECEIVED
DEC 11 2008

ENYCC
CORRECTIONAL FACILITY
CORRECTIONAL
Foster
Box 338
Napanoch, New York 12458-0338
Name: Dominick Figio Am. 0A5699



02 11 P
0004555273 DEC 09 2008
MAILED FROM ZIP CODE 11242

12458-0338

Dominick Florio
Din # 00A5699
Eastern Correctional Facility
P.O. Box 338
Napanoch, N.Y. 12458

November 22, 2008

Mr. Joseph Mure'
26 Court Street
Brooklyn, N.Y. 11242

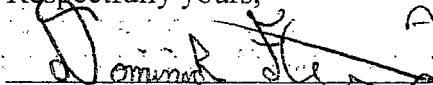
Dear Joseph:

I am writing this letter in regards to my case where you and Charles Ross represented me. This indictment number on this case is New York County Indictment # 6115/99. Joe, I need your assistance in answering some questions for me. I have a pending 440. 10 motion presently in the courts and I raised ineffective assistance of counsel on Charles Ross, not you. You were hired during pre-trial hearings, and never had adequate time to investigate the case at hand, and the judge denied your adjournment you asked for in order to prepare. The questions here are as follow;

1. In what capacity were you hired in my case? - At first, your family wanted me to take over the case two days before trial.
2. Did you have adequate time to prepare for my case? over the case two days before trial.
3. Did you go over all discovery materials? I told them that I could not prepare for trial in two days,
4. Did you interview any of the witnesses that testified? Prepare for trial in two days,
5. What trial strategy did you and Mr. Ross discussed for my defense? No, I did not have time to discuss trial strategy.
6. Did you ever see any medical records on my behalf by Kings County Hospital or Doctor William Vingiano, Ph.D. Report, that was hired by family? To prepare for your defense, I did not have time to review the medical records.

Just inform me as soon as possible, regarding the above and I thank your for your case & their assistance.

Respectfully yours,


~~Dominick Florio~~

As to discovery, I believe I read the
everything given to me

- (4) I did not interview any witness that testified
- (5) At first, there was no trial strategy, then we discuss self-defense
- (6) I don't believe any medical records were provided to me

EXHIBIT “B”

JUSTICE	ADJOURNED TO		REASON FOR	REMARKS	COURT REPORTER	ENTRIES BY
	PART	DATE				
HN CATALDO	70	9-21	ANT BAIL BAIL SET - H-Warrant	RICHARD S. ROMEO LORAHNE LOVERDE ASSOCIATE ROGER P. CONN ROGER P. CONN ROGER P. CONN	ROGER P. CONN ROGER P. CONN ROGER P. CONN ROGER P. CONN ROGER P. CONN	
HN CATALDO	80	9-7				
HN CATALDO	82	9-15	Motions	RICHARD S. ROMEO LORAHNE LOVERDE ASSOCIATE ROGER P. CONN ROGER P. CONN	ROGER P. CONN ROGER P. CONN ROGER P. CONN ROGER P. CONN ROGER P. CONN	
HN CATALDO	82	10/12	H-Warrant	RICHARD S. ROMEO LORAHNE LOVERDE ASSOCIATE ROGER P. CONN ROGER P. CONN	ROGER P. CONN ROGER P. CONN ROGER P. CONN ROGER P. CONN ROGER P. CONN	
HN CATALDO	82	11-1	dox	RICHARD S. ROMEO LORAHNE LOVERDE ASSOCIATE ROGER P. CONN ROGER P. CONN	ROGER P. CONN ROGER P. CONN ROGER P. CONN ROGER P. CONN ROGER P. CONN	
HN CATALDO	82	12-14	P.D.	RICHARD S. ROMEO LORAHNE LOVERDE ASSOCIATE ROGER P. CONN ROGER P. CONN	ROGER P. CONN ROGER P. CONN ROGER P. CONN ROGER P. CONN ROGER P. CONN	
HN CATALDO	82	1-25-2000		RANDY BERKOWITZ SR. CT. PROSECUTOR ROGER P. CONN	RANDY BERKOWITZ ASSOCIATE ROGER P. CONN ROGER P. CONN	
HN CATALDO	82	2-9	ISSUE BAIL	DIANA DAVITA KROREK SENIOR ASSISTANT ROGER P. CONN	DIANA DAVITA KROREK SENIOR ASSISTANT ROGER P. CONN	
HN CATALDO	82	2-9	ISSUE BAIL	JENISE HUNTINGTON ASSOCIATE ROGER P. CONN	JENISE HUNTINGTON ASSOCIATE ROGER P. CONN	

RECORD OF COURT ACTION

Form CRC 151.1

Date	Court Action	1	Adj. Request	Present	Absent	Notify	Excused
Part			People	Officer	Officer	Officer	Officer
Reporter	100-19050 P.F. Aug 11, 1971 Rptr: L. Michan		Defense	Complainant	Complainant	Complainant	Complainant
Judge			Consent	Defendant	Defendant	Defendant	Defendant
			Court	Attorney	Attorney	Attorney	Attorney
Reason for Adjournment							
SPEEDY TRIAL							
Adjournment period to be excluded under 30.30 CPL							
Adjournment period to be charged under 30.30 CPL							
The defendant, being without counsel, consents to this adjournment after having been advised of his rights under the Speedy Trial Rules and the effect of his consent.							
Bail Condition							
Date	Court Action	2	Adj. Request	Present	Absent	Notify	Excused
Part	100-19050 L. Michan		People	Officer	Officer	Officer	Officer
Reporter			Defense	Complainant	Complainant	Complainant	Complainant
Judge			Consent	Defendant	Defendant	Defendant	Defendant
			Court	Attorney	Attorney	Attorney	Attorney
Reason for Adjournment							
SPEEDY TRIAL							
Adjournment period to be excluded under 30.30 CPL							
Adjournment period to be charged under 30.30 CPL							
The defendant, being without counsel, consents to this adjournment after having been advised of his rights under the Speedy Trial Rules and the effect of his consent.							
Bail Condition							
Date	Court Action	3	Adj. Request	Present	Absent	Notify	Excuse
Part	82-12597		People	Officer	Officer	Officer	Officer
Reporter			Defense	Complainant	Complainant	Complainant	Complainant
Judge	50,000/50,000		Consent	Defendant	Defendant	Defendant	Defendant
			Court	Attorney	Attorney	Attorney	Attorney
Reason for Adjournment							
SPEEDY TRIAL							
Adjournment period to be excluded under 30.30 CPL							
Adjournment period to be charged under 30.30 CPL							
The defendant, being without counsel, consents to this adjournment after having been advised of his rights under the Speedy Trial Rules and the effect of his consent.							
Bail Condition							
Date	Court Action	4	Adj. Request	Present	Absent	Notify	Excus
Part			People	Officer	Officer	Officer	Officer
Reporter			Defense	Complainant	Complainant	Complainant	Compla

PEOPLE VS Dominice Florio COUNTY OF MONROE INDICTMENT NO. 6115-99
 N.Y.S.I.D. NO. _____ DATE OF BIRTH _____ SEX _____
 ADDRESS _____

NOTICE OF APPEARANCE 19

FILED BY _____
 ADDRESS _____

TELEPHONE NO. _____

RET L.A. 18B

SUBSTITUTION 19

FILED BY _____
 ADDRESS _____

TELEPHONE _____

RET L.A. 18B

ARRAIGNMENT PART 70 SEP - 1 1999 19

PLEA NOT GUILTY

JUSTICE HON. JOHN CATALDO

COUNSEL PRESENT Rubenstein

ADA PRESENT Bogdon

COURT REPORTER Eunice Taylor

INTERPRETER ENGLISH COURT REPORTER

COURT CLERK /

ARTICLE 730 EXAMINATION

ORDERED 19

JUSTICE _____

COURT CLERK _____

COURT REPORTER _____

ORDERED 19

JUSTICE _____

COURT CLERK _____

COURT REPORTER _____

RECOGNIZANCE

ROR 19

BAIL FIXED _____

AMOUNT _____

COURT CLERK _____

COUNSEL PRESENT _____ JUSTICE _____

ON CONSENT OF ADA _____

COURT REPORTER _____

BAILED 19 \$ _____

SURETY _____

COURT CLERK _____

~~BAIL REVOKED BW~~ PART 70 AUG 3 1 1999

JUSTICE HON. JOHN CATALDO AE REvised

BAIL FORFEITURE 19

JUSTICE _____

BAIL EXONERATED _____

JUSTICE _____

SURR. BY SURETY 19

SUBSEQUENT ACTION RE RECOGNIZANCE

PART PART 70 SEP 01 1999 19

Invol Row - WV

JUSTICE HON. JOHN CATALDO

ADA PRESENT _____

COUNSEL PRESENT _____

COURT REPORTER E. Taylor

COURT CLERK M. Dell'Orto

PART PART 82 SEP 15 1999 19

BAIL BOND EXONERATED,

New Bail set - \$100,000.00

JUSTICE HON. CHARLES SOLOMON Or

ADA PRESENT BOB DANOS

T. Connor

MOTIONS

TYPE: On motion 10-12 1999
 COURT CLERK ROGER P. CONNOLLY
 ASSOCIATE COURT CLERK
 MOTION BY: DEFENSE PEOPLE - COURT
PEOPLE - DEFENSE CONSENT - OPPOSE
 DETERMINED PART-82 NOV - 9 1999 19
 JUSTICE HON. CHARLES SOLOMON
 DETERMINATION G.J. MIN. SUFF.
H. W granted

TYPE:
 COURT CLERK
 MOTION BY: DEFENSE + PEOPLE - COURT
 PEOPLE - DEFENSE CONSENT - OPPOSE
 DETERMINED _____ 19
 JUSTICE _____
 DETERMINATION _____

TYPE: 19
 COURT CLERK
 MOTION BY: DEFENSE - PEOPLE - COURT
 PEOPLE - DEFENSE CONSENT - OPPOSE
 DETERMINED 19
 JUSTICE _____
 DETERMINATION _____

HEARINGS

TYPE Hunt-Wadell PART-82 FEB - 9 2000
 JUSTICE HON. CHARLES SOLOMON
 ADA PRESENT Bogdanos
 COUNSEL PRESENT Ross.
 COURT REPORTER DENISE HUNTINGTON
 SENIOR COURT REPORTER
 INTERPRETER
 DATE COMMENCED PART-82 FEB - 9 2000
 DATE COMPLETED PART-82 FEB - 9 2000
 DECISION _____

COURT CLERK ROGER P. CONNOLLY
 ASSOCIATE COURT CLERK
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 TTO DET PATRICIA McGOVERN TI(T) DET VINCENT CON
 TYPE SANDOVAL 2/12/19 2000
 JUSTICE Hon. C. Solomon
 ADA PRESENT M. Bogdanos
 COUNSEL PRESENT C. Ross
 COURT REPORTER D. Huntington
 INTERPRETER
 DATE COMMENCED 2/10/2000 19
 DATE COMPLETED 2/10/2000 19
 DECISION See MINUTES 2/14/2000

COURT CLERK R. Montemayor
 DAILY COPY

TYPE 19
 JUSTICE _____
 ADA PRESENT _____
 COUNSEL PRESENT _____
 COURT REPORTER _____
 INTERPRETER _____
 DATE COMMENCED _____ 19
 DATE COMPLETED _____ 19
 DECISION _____ 19
 COURT CLERK _____
 DAILY COPY

SENIOR COURT OFFER

Jury Panel of 90 entered + sworn
Judge's Preliminary Instructions to Panel
Voir Dire begins

Jurors 1-12 + 4 alternates selected + sworn

PART-82 FEB 18 2000 DENISE HUNTINGTON SENIOR COURT REPORTER

ANN BOGIER OC R

Judge's Preliminary INSTRUCTIONS

People's OPENING STATEMENT

Defense OPENING STATEMENT

Andrew BROWN - Brooklyn Resident

Direct EXAMINATION

CROSS EXAMINATION

Re-DIRECT

Glenn XAVIER - Connecticut Resident

Direct EXAMINATION

CROSS EXAMINATION

George GREEN - Complainant

Direct EXAMINATION

CROSS EXAMINATION

Re-DIRECT

Ilse SINGER - NY County Resident

Direct EXAMINATION

CROSS EXAMINATION

Re-DIRECT

Re-CROSS

Eleutorio Turrell - BX Resident

Direct EXAMINATION -

CROSS EXAMINATION

PART-82 FEB 17 2000

DENISE HUNTINGTON + ANN BOGIER OC R
SENIOR COURT REPORTER

⑥ EFRAIN CARABELLO Ny county

Direct - Cross - Re-Direct

⑦ P.O. CHRISTOPHER JACOBELLIS - NYPD 6342

W/ West

TT Nebulthal

⑧ DET. PATRICIA McGOVERN NYPD #522

Direct - Cross TT West & West

Change Conference

PART-82 FEB 18 2000

DENISE HUNTINGTON

SENIOR COURT REPORTER

Ann Bogier OCR

AS summation TI's summation

Judge's Charge to Jury
Deliberation

Verdict

APPEALS

APPELLATE DIVISION

NOTICE OF APPEAL FILED

19

BAIL PENDING APPEAL

\$

JUSTICE

DATE

BAILED

19

\$

SURETY

DISPOSITION

PLEA

JUSTICE _____

19

PART _____

DEFENDANT PLEADS GUILTY

BEFORE)
DURING)

TRIAL TO

COURT CLERK _____

DA CONSENTING _____

COUNSEL PRESENT _____

COURT REPORTER _____

INTERPRETER _____

TRIAL

COMMENCED PART-82 FEB 14 2000

PART

JUSTICE HON. CHARLES SOLOMON

DA PRESENT Bogdanos

COUNSEL PRESENT Ross, Mure

COURT REPORTERS DENISE HUNTINGTON
SENIOR COURT REPORTER

ROGER P. CONNOLLY

COURT CLERK ASSOCIATE COURT CLERK

INTERPRETER _____

CONCLUDED

ACRIED AND FOUND NOT GUILTY

ACRIED AND FOUND GUILTY OF

ASSAULT 1° (CTS) 120.10 (1)

FNG (CTS 1,3)

SENTENCE

PART-82 APR 12 2000

19

PART COUNSEL PRESENT Ross / Mure

ADA PRESENT Bogdanos

COURT REPORTER _____

ERIC ALLEN
AN. COURT REPORTER

INTERPRETER _____

SECTION 380.50 C.P.L. COMPLIED WITH

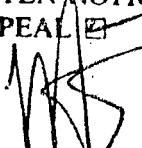
COURT CLERK _____

ROGER P. CONNOLLY
ASSOCIATE COURT CLERK

SENTENCED 15 YEARS NYSDC

\$150.00 MANDATORY
SURCHARGE IMPOSED.
\$5.00 CVAF IMPOSED.

DEFENDANT GIVEN WRITTEN NOTICE OF HIS
RIGHT TO APPEAL


JUSTICE OF SUPREME COURT
HON. CHARLES SOLOMON

PENAL
MOTIONS UNIT

Dominick Florio
Div #00A5699
Collins, Corr. Fac.
PO Box 340
Collins, NY 14034

2009 MAILED
February 5, 2009

DISTRICT ATTORNEY
NEW YORK COUNTY

Honorable Charles Solomon
Supreme Court of the State of New York
100 Centre Street
New York N.Y. 10013

Re: People V. Florio Ind. NO. 6115/99 (Requesting to Amend
Renewal motion dated January 21, 2009, with additional Supporting
evidence. N.Y.C.R.R. 2221:9

Honorable Solomon,

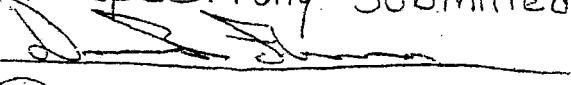
Please be advised I am making a request to amend my motion to
Renewal, with additional Supporting evidence. Defendant received this evidence
on February 2, 2009, from attorney Joseph More, 26 Court Street Brooklyn N.Y.
11242. This evidence supports my claim on the Renewal motion. That there
was no conversation on February 7, 2000 about Counsel considered and
~~then decided against raising any psychiatric defense by defense attorney~~
~~Charles Ross and Joseph More.~~ Mr. More did not have the opportunity to
review the defendant medical record. See (exhibit A Inclose amending
Renewal motion). Mr Ross never provided these records, and do to your denied request
to prepare for trial (See exhibit A) District Attorney Matthew Bogdano clearly
submitted false perjured testimony on there, (Summary of Facts 5. memorandum
of law in response to defendant's C.P.L. 440.10 date Oct. 3, 2008) (See motion to
Renew P.S. line 10). In Violation of DR-7-102 (A)(4)(5)& DR-7-102 (B)(2).
(Carriage House Realty Co. v. Conlon 1985. 493 NYS2d 687) (Weaver v. State 1985.
Wainwright v. Sykes 1982)

Do to the timing this defendant received this new Supporting affidavit. The defendant would like the Court to amend defendant's motion to Renew with Mr. More affidavit in Support of defendants motion to Renew C.P.L.R. 2221:4 on January 21, 2009 (Ulster Sav. V. Goldman, 800 NYS2d 170) (Weitzberg V. Nassau 2. Dept 2008, 862 NYS2d 556).

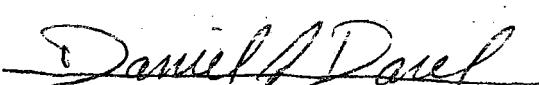
WHEREFORE, it is respectfully requested that this Courts decision and order dated December 23, 2008. Stamp on January 9, 2009, then sent to the defendant above. Denying defendant's motion pursuant to Vacate. C.P.L. 440.10 Should reversed on the law. This defendant Clearly proves with the inclosed affidavits and on his motion to Renew. This Court based there decision on false perjured testimony, to say the least. (See Renew motion P.7 (14)) Therefore this court Should Vacate their prior decision, remit the matter for a hearing, in the alternative the Court Should reverse the judgement of conviction and order a new trial.

Sworn to before me

Respectfully Submitted


Dominick Florio

This 9th day of February 2009


Daniel J. Darel
NOTARY PUBLIC

DANIEL J. DAREL
NOTARY PUBLIC, STATE OF NEW YORK
CERTIFIED IN ERIE COUNTY
MY COMMISSION EXPIRES 10/29/12
REGISTRATION NO 01DA6194226

EXHIBIT A



JOSEPH MURE JR. & ASSOCIATES

26 Court Street • Suite 2810 • Brooklyn, NY 11242

718.852.9100

joemurejr@aol.com

January 20, 2009

Dominick Florio
Eastern NY Correctional Facility
P.O. Box 338
Napanoch, New York 11258

**RE: People v. Florio
Indictment No. 6115/99**

Dear Mr. Florio,

As you are aware, I was one of the attorneys retained to represent you in your Attempted Murder trial before the Hon. Charles Solomon in Part 82 of New York County.

Your initial attorney of record was Chuck Ross.

When I joined your defense team, the day before your trial was scheduled to commence, it appeared that yourself and Mr. Ross were having difficulty communicating with one another.

Upon being formally retained, we requested an adjournment for purposes of my being provided adequate opportunity to bring myself up to date regarding the specifics of your case in furtherance of our objective that I play a significant role alongside Mr. Ross in your defense. Judge Solomon denied this request.

Inasmuch as I was not provided sufficient time to act in the role of lead counsel, Mr. Ross maintained that role throughout the trial. I reviewed evidence on your behalf and attempted to assist Mr. Ross as his second to the best of my abilities given the circumstances. I did not interview any witnesses at the trial nor was I provided the opportunity to review your medical records.



JOSEPH MURE JR. & ASSOCIATES

26 Court Street • Suite 2810 • Brooklyn, NY 11242

718.852.9100

joemurejr@aol.com

My role was thus very limited to assisting in the formulation of a trial strategy and acting as an intermediary between yourself and Mr. Ross given the apparent breakdown in your respective lines of communication.

I thank you for your consideration in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph Mure, Jr., Esq." It is written in a cursive style with a large, sweeping flourish at the end.

APPENDIX. C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 82

-----x
THE PEOPLE OF THE STATE OF NEW YORK, : DECISION AND ORDER
: INDICTMENT 6115-99
: -against-
DOMINICK FLORIO, DEFENDANT :
-----x
CHARLES H. SOLOMON, J.:
-----x

In a *pro se* application filed April 25, 2008, defendant has moved to vacate the judgment of conviction in the above entitled case under CPL 440.10. Defendant argues that the conviction should be vacated because he did not receive effective assistance of counsel. Specifically, defendant alleges that his attorney failed to investigate and present evidence of his mental disease or defect, which would have shown that he did not appreciate the nature and consequences of his actions. Defendant claims that his attorney's failure to request that the Court charge the jury on the issue of intoxication was ineffective assistance, as such charge would have caused the jury to entertain doubt regarding the element of intent. Defendant also contends that his attorney failed to produce evidence which could have been used to impeach complainant's testimony at trial. Finally, defendant claims that he was denied due process as a result of his attorney's mistakes. The People oppose defendant's motion in a response filed October 6, 2008. Defendant filed a reply to the People's response on October 21, 2008. For the reasons set forth below, defendant's motion is denied in its entirety.

On February 17, 1999, at approximately 3:00 a.m., defendant and complainant George Greene were both at Club Om on West 22nd Street. Defendant maintains that, as Greene approached the bar, he abruptly bumped into defendant, used offensive language toward him and did not apologize. He claims that Greene tried to irritate and intimidate him by grabbing defendant by the neck. In response, defendant cursed back at Greene. Defendant claims that Greene then reached toward his waist area as though he intended to pull out a weapon. Defendant fearing for his safety, he picked up a bottle of champagne and "propelled a single blow to the top of Mr. Green's [sic] head causing him to fall to the floor." Defendant attempted to leave the club but, at the behest of the bartender, a security guard stopped him, requested identification and copied it before permitting defendant to leave. The force of the impact fractured Greene's skull. He suffered a right temporal contusion which, during his lengthy hospitalization, required surgery and the insertion of two plates in his head to replace a portion of his skull.

Defendant was indicted and charged with an Attempted Murder in the Second Degree [Penal Law §110/125.25(1)] and two counts of Assault in the First Degree [Penal Law §§120.10(1) and 120.10(3)]. Following a jury trial in which he put forth the affirmative defense of justification, defendant was acquitted of Attempted Murder in the Second Degree and Assault in the First Degree under the theory of depraved indifference. With respect to count two of the indictment, Assault in the First Degree, under the theory

that defendant intentionally caused serious physical injury to another by means of a deadly weapon or dangerous instrument, defendant's claim of self-defense was rejected by the jury and he was convicted. On April 12, 2000, defendant was sentenced to a determinate term of imprisonment of fifteen years. Defendant appealed and, on September 24, 2002, his conviction was affirmed. People v. Florio, 297 AD2d 612 (1st Dept 2002), *lv denied* 100 NY2d 594 (2003).

Defendant now files a motion pursuant to CPL 440.10, challenging the trial decisions made by lead counsel. Defendant argues that the self-defense strategy pursued by counsel was "doomed to failure" from its inception. He states that counsel should have presented the affirmative defense of lack of responsibility by reason of mental disease or defect. Defendant also believes that counsel should have argued that defendant was so intoxicated on the night of the assault that he was unable to form the intent necessary to commit the crime. Further, he criticizes the cross-examination of the complainant, stating that counsel failed to impeach him.

In support of his motion, defendant offers the results of a neuropsychological report from February, 2000. The report reveals defendant's below average I.Q. and concludes that defendant suffers from chronic impulse control disorder, exacerbated by a 1997 head trauma. Defendant claims that drinking alcohol on the night of the assault further intensified his condition. Defendant also provides records generated after his incarceration in which he was diagnosed as bipolar. Defendant argues that his attorney should have submitted the February 2000 report to the court and called an expert to prove that he suffers from a mental disease or defect.

Defendant also claims that he was too intoxicated to form the necessary intent to commit the crime of assault. He states that he used to be addicted to Vicodin, had been drinking for an hour and a half and had just ordered his third bottle of champagne when the assault occurred. Defendant first argues that his attorney was ineffective based on his "inaction" when the court refused to charge the jury on intoxication and later argues that he was ineffective for failing to request the charge. Defendant states that his attorney "should have unequivocally resorted to other strategically and more advantageous trial tactics . . ."

Defendant revisits his self-defense claim arguing that counsel should have elicited testimony regarding complainant's actions at the time of the incident which, he states, instigated this assault. He argues that his perception at the time of the assault, however inaccurate, was reasonable in view of his extreme emotional disturbance and mental disease. Defendant also claims that counsel's inability to impeach the complainant constitutes ineffective assistance of counsel.

The People argue that defendant's motion is baseless and must be dismissed because it raises issues that should have been argued on direct appeal. They argue that, should the court entertain the motion, defense counsel's representation was meaningful

and defendant was not deprived of a fair trial. The People state that defendant's motion is factually inaccurate and legally unsupportable.

The People submit that defendant's attorney provided competent representation throughout motion practice, plea negotiations and trial. They argue that any probative value that defendant's psychological and medical records might have had for the jury would have been greatly outweighed by the devastating effect of having a psychologist cross-examined about the defendant's prior violent criminal history. The People argue that defendant's attorney was, in fact, so effective that he won an acquittal on the top count of the indictment, attempted murder. They argue that the evidence of defendant's intoxication was presented to the jury through defendant's own testimony. The People state that the jury simply did not credit defendant's testimony regarding his claim of self-defense. The People submit that defendant has failed to meet his burden to demonstrate ineffective assistance of counsel.

The law in the area of ineffective assistance of counsel is clear. Under the United States Supreme Court decision in Strickland v. Washington, 466 US 668, 686-687 (1984), in order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his attorney's performance was deficient and that this deficiency prejudiced the defense. Under the Strickland test, a defendant must demonstrate that there is a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In New York, under our Court of Appeals decisions, the standard is somewhat different. The New York definition of ineffective assistance of counsel is referred to as the Baldi test. New York holds that "[s]o long as the evidence, the law and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." People v. Baldi, 54 NY2d 137, 147 (1981); *see also* People v. Ozuna, 7 NY3d 913 (2006); People v. Caban, 5 NY3d 143, 152 (2005). Under either standard, defendant's claim must fail.

The concept of ineffective assistance of counsel has never been subject to a precise definition. Yet, in analyzing a claim of ineffective assistance of counsel, certain well established principles must be kept in mind. Disagreement with an attorney's tactics or strategies is not the test of ineffectiveness. People v. Flores, 84 NY2d 184, 187 (1994). As our Court of Appeals has held, "[a]s long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance." People v. Benevento, 91 NY2d 708, 713 (1998).

Throughout his motion, defendant admits that the basis for his ineffective assistance of counsel claim is his belief, in hindsight, that his self-defense claim was a losing trial strategy. He states that the more "plausible" line of defense would have been that he was not responsible by reason of mental disease or defect or, due to intoxication, he lacked the ability to form the intent to commit an assault. As noted by the People, defendant ignores that his attorney managed to win an acquittal on the top count of the indictment, attempted murder.

"[T]rial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness." People v. Baldi, *supra*, at 146-147. Defendant was afforded vigorous representation that resulted in his acquittal on the top charge of the indictment. Counsel pursued a plausible strategy in putting forth a self-defense claim. Here, "the evidence, the law and the circumstances . . . viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation . . ." *Id.* Thus, defendant received effective assistance of counsel and was afforded due process under both the Federal and State constitutions.

CPL 440.10(2)(c) states, in pertinent part, that the court must deny a motion to vacate a judgment when “[a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant’s . . . unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.”

Defendant appealed the judgment of conviction on the issues of credibility, the sufficiency of the evidence, the trial court's charge on "initial aggressor" and prosecutorial misconduct. None of these claims were credited by the Appellate Division. *People v. Florio, supra.*

Defendant did not raise the issue of ineffective assistance of counsel on his direct appeal and he is procedurally barred from collaterally attacking his conviction in a motion pursuant to CPL 440.10. People v. Pedraza, 56 AD3d 390 (1st Dept 2008). To the extent that defendant complains about matters outside the record, his motion is deficient in that it offers only his own self-serving, after-the-fact affidavit and does not include an affidavit from trial counsel. *See, People v. Rogers*, 8AD3d 888 (3rd Dept 2004). Additionally, defendant does not offer any explanation for his failure to include such affidavit. People v. Morales, 58 NY2d 1008 (1983); People v. Stewart, 295 AD2d 249 (1st Dept 2002), *lv denied* 99 NY2d 540, *cert denied* 538 US 1003.

Based on a complete review of the record in this case, it is clear that defendant received meaningful representation, People v. Baldi, *supra*. Additionally, defendant has failed to meet his burden to demonstrate that matters outside the record require the conviction to be vacated. For the above stated reasons, defendant's motion to vacate the judgment of conviction is denied.

This opinion constitutes the decision and order of the Court.

Dated: December 23, 2008
New York, New York

STATE THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL WHICH I
MADE IN MY OFFICE AND IS IN MY POSSESSION.

CHARLES H. SOLOMON, J.S.C.

APPENDIX, D

1
2 SUPREME COURT
CRIMINAL TERM

NEW YORK COUNTY
PART 82

3 THE PEOPLE OF THE STATE OF NEW YORK : INDICTMENT #
4 : 6115/99

5 -against- :
6 DOMINICK FLORIO, : CHARGE:
7 : ATTEMPTED
Defendant. : MURDER 2

8 -----: CALENDAR CALL

9 111 Centre Street
New York, N.Y. 10013
February 7, 2000,

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11 B E F O R E :

12 HONORABLE CHARLES SOLOMON,
JUSTICE OF THE SUPREME COURT

13 A P P E A R A N C E S :

14 ROBERT M. MORGENTHAU, ESQ.,
15 New York County District Attorney
16 BY: MATTHEW BOGDANOS, ESQ.,
17 Assistant District Attorney
18 (For the People)

19 BRAFMAN & ROSS, PC
20 767 Third Avenue
21 New York, NY 10017
22 BY: CHARLES A. ROSS, ESQ.,
ANDREA ZELLAN, ESQ.,

23 ALSO PRESENT:

24 JOSEPH MURE, ESQ.

(For the Defendant Florio)

25 Denise M. Huntington, RPR, CSR
26 Senior Court Reporter

Denise M. Huntington, RPR, CSR
Senior Court Reporter

1 Proceedings

2 COURT CLERK: Calendar No. 8,

3 Dominick Florio.

4 THE COURT: Appearances, please.

5 MR. ROSS: Charles A. Ross, and
6 Andrea Zellan, Brafman & Ross,
7 767 Third Avenue, New York, New York, for
8 Mr. Florio.9 MR. MURE: Joseph Mure, 26 Court Street,
10 Brooklyn, New York.11 MR. BOGDANOS: Matthew Bogdanos for the
12 People.

13 THE COURT: Counsel?

14 MR. ROSS: Yes, sir.

15 THE COURT: The case is on today for
16 hearings. I've previously granted a Huntley
17 and Wade hearing.18 We had talked, I know, many times in the
19 past about having a hearing this week.

20 MR. ROSS: Yes.

21 THE COURT: It was supposed to be
22 Wednesday afternoon and we had adjourned it
23 to today, just for everyone's schedule, mine
24 and everyone else's.

25 You are telling me now, you are asking

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for an adjournment, as you told me at the bench with Mr. Mure and Mr. Bogdanos present.

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MR. ROSS: Yes sir, I did. We asked, at the bench, and let me state for the record the reasons why I am requesting this adjournment.

This past Friday I visited my client at Rikers Island, and among other things, my client stated to me that if it wasn't for his family, I would be off the case. We had a very heated discussion over this. He, at various times, called me stupid, and berated me for not conducting appropriate investigations, or getting him a defense that was worthy of this trial.

In fact, insofar as the family is concerned, there is one member of the family who has been supportive of my continued involvement in the case. Another member of the family, as of Friday, was equally hostile to my continued presence as primary trial counsel to Mr. Florio.

Mr. Joseph Mure and I have had negotiations last Friday, over the weekend,

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2 and most recently, yesterday, and he's in
3 court today. It's my understanding that the
4 family is comfortable with him, and that is
5 true of Mr. Florio, as well. We, in fact,
6 jointly met with Mr. Florio this morning, and
7 it was my considered opinion that the
8 attorney/client relationship that existed
9 between Mr. Mure and Mr. Florio, was
10 certainly a more solid one than that which I
11 have, at this point, with Mr. Florio.

With all that said, certainly today, for
me to do the hearing, with my impression of
how my relationship with Mr. Florio stands,
would, in my judgment, be counter to what he
has said to me about my continued presence in
the case. I don't represent the family, I
represent Mr. Florio.

19 Now, I understand this is an eleventh
20 hour sort of situation, here, but what I'm
21 hopeful of trying to do is to resolve the
22 issue of representation over the next two
23 days, and to discuss with Mr. Florio, in some
24 more detail, what he wishes to do here, in

1 Proceedings

2 evidence that Mr. Bogdanos will bring in.

3 He has turned over to me all of the
4 Rosario material, all of the grand jury
5 material, all the DD5's, and I have had an
6 opportunity to review them in great depth,
7 and I've shared my perceptions of them with
8 Mr. Florio, with Mr. Mure's involvement.9 Given that he has a long-standing
10 relationship with Mr. Florio, perhaps
11 your Honor could see your way clear to giving
12 us 48 hours to try to resolve this and come
13 back here, one way or the other, to come in
14 here on Wednesday afternoon and be prepared
15 to proceed with the hearing.16 That might be the best course of action
17 under these circumstance.18 THE COURT: Let me see if I understand
19 correctly. You are saying, as far as I
20 understand, and I am going to ask Mr. Mure a
21 couple of questions on the record in a
22 second, but Mr. Ross, as far as you are
23 concerned, your are consenting to an
24 adjournment, or asking for an adjournment
25 until Wednesday to do the hearing?

1 Proceedings

2 MR. ROSS: I am, as it stands today,
3 judge.

4 THE COURT: Because the People are
5 ready. The detective is here.

6 MR. ROSS: I understand that, and I have
7 spent my weekend preparing for this hearing
8 in the event that your Honor were to direct
9 me to proceed with the hearing, I can do that
10 today.

11 I am just stating to your Honor that
12 were I to proceed as counsel for Mr. Florio,
13 it is my impression that he's uncomfortable
14 with that, to the degree that I have a
15 described on the record.

16 THE COURT: Certainly, where an issue
17 doesn't exist previously, it exists now, and
18 should he be convicted after trial and
19 receive a prison sentence, this is certainly
20 going to be an issue on appeal.

21 MR. ROSS: I think that's right.

22 THE COURT: Right, and I don't want
23 that.

24 If I understand correctly, either you
25 and/or together with Mr. Mure, on Wednesday,

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will be ready to proceed, whoever it is going to be.

MR. ROSS: I'm hopeful that that is true.

Whether or not Wednesday comes around,
and I come to your Honor and I say,
Judge Solomon, I am asking to be relieved
from this case, I am not, at that point, yet.

THE COURT: But Mr. Mure will be ready, then, on Wednesday, that is the point I am making.

I want to just say, this happens quite frequently on the eve of trial

MR. ROSS: I understand

THE COURT: At the eve of a hearing the defendant, for whatever reason, hires a new lawyer, or wants a new lawyer. In a lot of cases where someone is hired, I think the understanding is that the person is hired with the understanding he comes in and proceeds.

Mr. Mure will have all of the available information that you have to review. He met, obviously, with the defendant's wife and his son.

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today, and he will be ready on Wednesday, as well.

I don't think this is an unreasonable request I am making to you now. If the hearing doesn't go forward today, which I am inclined to grant that application for a 2-day continuance, it will go forward on Wednesday, and you will resolve the issue of representation between now and then.

MR. ROSS: Yes, sir.

THE COURT: Mr. Mure?

MR. MURE: Basically, judge, I got involved in this case based upon numerous calls from Mr. Florio and his family. It appears as though when Mr. Florio first got arrested, there may have been certain things that were happening inside of his life, where maybe his mind frame was not effective at that point.

THE COURT: He's been in front of me since September 7th, right after Labor Day.

MR. MURE: Right.

THE COURT: Mr. Ross has been here, and

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MR. MURE: I understand exactly.

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1 Proceedings

2 background. I have been involved in each one
3 of those cases, and I feel I can possibly
4 help Mr. Florio during this case. But I am
5 not --

6 THE COURT: He is entitled to counsel
7 of his choice.

8 MR. MURE: Sure, and I am not asking,
9 judge -- I am not looking to come into this
10 case and remove Mr. Ross out of the case.
11 That is not my intention at all.

12 In fact, I clearly stated to Mr. Ross,
13 he's been paid, he's supposedly handling the
14 case.

15 THE COURT: I told you at the bench, I
16 never get involved with the monetary aspects
17 of all of this. This is between the
18 defendant and counsel. I don't want to know
19 about it. I don't want to know the
20 arrangements of where the money is, where
21 it's coming from, who is giving what to
22 whom. I don't want to know that. I am
23 concerned with him having the lawyer of his
24 choice.

25 MR. MURE: Yes, and based upon my

1 Proceedings

2 conversation with Mr. Florio in the back, it
3 appears as though he would like Mr. Ross to
4 try the case, but he would like me to be
5 involved in the trial.

6 THE COURT: Fine. If it comes to that,
7 on Wednesday, Mr. Ross, your associate, and
8 Mr. Mure can all sit at counsel table for,
9 certainly, the hearing at least, and we will
10 take it from there.

11 MR. MURE: Thank you, sir.

12 THE COURT: But I think I'm inclined to
13 give you the adjournment to Wednesday
14 afternoon, with the understanding that on
15 Wednesday afternoon the case is going
16 forward, and this gives you adequate time.

17 You have all the Rosario material.

18 Mr. Bogdanos, I've heard him say many times,
19 engages in open file discovery. He will give
20 you more than you're entitled to, and the
21 case will proceed on Wednesday.

22 You can talk to Mr. Florio, Mr. Mure,
23 Mr. Ross, between now and then, as much as
24 you want, and work all of this out. But
25 ~~Wednesday~~, ~~Wednesday~~ when we call the case. we

1 Proceedings

2 are going to go forward.

3 MR. ROSS: That's fine, judge.

4 Thank you.

5 THE COURT: Mr. Bogdanos, your
6 detective is available Wednesday?

7 MR. BOGDANOS: They are indeed
8 available.

9 THE COURT: There's two witnesses at
10 the hearing?

11 MR. BOGDANOS: Yes, your Honor.

12 THE COURT: Do you want them in the
13 courtroom for this, or does it matter to
14 anybody?

15 MR. ROSS: It doesn't matter.

16 THE COURT: Fine.

17 Go ahead.

18 MR. BOGDANOS: Just to put some things
19 on the record that may not already be on the
20 record, Mr. Mure, who has a prior
21 relationship with Mr. Florio, was at least
22 initially involved in this case, at least at
23 the arraignment time period, and then
24 Mr. Ross became involved. He has, of course,
been involved throughout the entire course on

1 Proceedings

2 the indictment, while it was proceeding
3 towards trial.

4 And again, I have the same concerns
5 your Honor has at the eve of trial. We have
6 all seen it before, but we should be clear
7 about one thing, and this isn't on the record
8 yet. I mean, Mr. Ross is on anyone's short
9 list of attorneys. You get in trouble, he's
10 on your short list. This is the guy you want
11 trying your case in New York County. It
12 doesn't even, as your Honor said at the
13 bench, pass the smell test. It is even worse
14 in passing the smell test because we are
15 talking Chuck Ross, we are not talking about
16 someone else. So those are my concerns. So
17 I don't want your Honor to think that my
18 silence or willingness to go along with the
19 delay until Wednesday, in any way, is
20 construed as believing that this is what it
21 is.

22 THE COURT: I agree with you, Mr. Ross
23 is an excellent lawyer.

24 MR. BOGDANOS: So Wednesday, we are
25 going forward, whether it's with Mr. Ross,

1 Proceedings

2 Mr. Mure, a combination of both, or someone
3 else. We are going forward on Wednesday,
4 picking a jury on Thursday, opening on Monday
5 morning, closing arguments next week at some
6 point, and then the jury will speak.

7 THE COURT: Absolutely.

8 Mr. Ross and Mr. Mure, again, that is
9 the schedule we have always contemplated. I
10 want to go forward, then, in saying Wednesday
11 afternoon we will do the hearings. After the
12 hearings on Thursday we will have jury
13 selection. Friday is a court holiday, a
14 legal holiday, and Monday we will have
15 testimony. That is going to be with
16 Mr. Ross, Mr. Mure, both of you, one of you,
17 whatever combination there is.

18 Excuse me if I don't put your name in
19 there, I'm talking about Mr. Ross and his
20 associate when I say Mr. Ross.

21 So that is what is going to happen here.
22 I just want that to be clear. I'm granting
23 this adjournment today, really, as a matter
24 of courtesy, as well as it being something I
25 feel I should do in order to have this

1 Proceedings

2 resolved. But Wednesday afternoon we are
3 going to go forward.

4 Anything else today?

5 MR. ROSS: May we approach?

6 THE COURT: You know what, let's talk
7 on the record. I usually like to do that,
8 only because the defendant then has the
9 advantage of hearing my thoughts, everything
10 the lawyers say, everything I say, and so
11 there's no misinterpretation, which sometimes
12 there is, in the defendant thinking that I
13 meant one thing or said one thing. This way,
14 everything is out in the open, on the record.

15 MR. ROSS: That's fine, judge.

16 Judge, let me just hand up to the Court
17 a copy, and I will give Mr. Bogdanos a copy
18 as well, of a psychiatric report that we
19 have, not for the purposes of trial, but
20 Mr. Bogdanos and I have discussed the 250.10
21 issue.

22 I don't intend to call a psychiatrist if
23 this case does proceed to trial, I do not.
24 However, what I am submitting this for is the
25

Denise M. Huntington, RPR, CSR
Senior Court Reporter

1 Proceedings

2 resolution of the matter, short of trial.

3 In essence, what Dr. William Vingiano
4 sets forth in this report is that Mr. Florio
5 suffered a very, very bad car accident, and
6 that that caused some, albeit, not major, but
7 some neurological damage, and has led to a
8 very difficult situation with impulse
9 control.

10 THE COURT: Well, he is out drinking,
11 in the middle of the night, at the Club Ohm,
12 so I don't know why he is doing that if he
13 has the problem with impulse control. That's
14 not good.

15 You understand that?

16 MR. ROSS: I certainly understand that,
17 judge. In fact, I think the other thing that
18 I think I've mentioned to your Honor is that
19 Mr. Florio also had a problem and was detoxed
20 for this when he was first arrested, with
21 prescription painkillers. There was Vicodin
22 that was being taken.

23 So while this certainly does not excuse
24 very, very serious conduct, what we would ask

25 is that the Court consider his health problems.

1 Proceedings

2 young man here with a low I.Q., and I think
3 that's clear from the battery of tests that
4 were done. We are not talking about a person
5 with an I.Q. that's particularly high, here.

6 In addition, some neurological damage
7 that was as of a result of this car accident,
8 and obviously, his family is very concerned
9 about him. This is a very serious, serious
10 charge that he is facing here.

11 The fact of the matter is that in my
12 review of the hospital records, the
13 complainant was badly injured. Today, his
14 functioning is not impaired by his own
15 inability to function. I don't think there's
16 any significant brain damage. I do know that
17 he does have permanent plates in his head.

18 THE COURT: The notes I made, and I do
19 this in most cases from the grand jury
20 testimony, is that he underwent a seven and a
21 half hour operation for brain surgery, and
22 has had a fractured skull and two permanent
23 plates in his head.

24 MR. ROSS: That is true, and that is a
25 very, very serious injury but in a case like

1 Proceedings

2 difficult case where, obviously, there could
3 have been a more difficult situation for the
4 complainant, he is, thankfully, able to
5 function at, I believe, a reasonable level
6 that's not directly impaired, in terms of
7 brain functioning, by the injury that he
8 suffered.

9 All of this, I'd suggest, your Honor,
10 mitigates the very serious charges that are
11 leveled against Mr. Florio, at this point,
12 and what I'm asking from your Honor is a
13 consideration for a plea offer to be
14 extended.

15 Now, what we have talked about --

16 THE COURT: I don't really think it is
17 a plea offer, I think it is a sentence offer;
18 a sentence commitment for me.

19 It is such a wide range from the
20 minimum, which is 5 years determinate, and
21 the maximum, which is 25 years. It is a
22 20-year range.

23 I haven't heard from the DA yet, so I
24 don't know what the People would recommend,

25 ~~I don't know what the People is seeking.~~

1 Proceedings

2 Obviously, you're seeking leniency, but it is
3 a question of, again, putting all of this
4 into numbers, which I don't know that I can
5 do, at this point.

6 MR. ROSS: Yes, I know. We've discussed
7 that before, your Honor, and we've talked
8 about the possibilities of some sort of open
9 resolution, some sort of open plea where we
10 would bring all of the facts to your Honor's
11 attention for the day of sentence.

12 I've certainly conveyed that to
13 Mr. Florio, and if I recall correctly, and if
14 your Honor's notes indicate something
15 different, let me know, but my own personal
16 recollection when your Honor and I talked,
17 was that your Honor sort of admonished me
18 that if my client was considering that his
19 sentence would be in the 6 or 7 year
20 neighborhood, that that might be overly
21 optimistic. That is my recollection of what
22 your Honor's statement to me was.

23 THE COURT: That is my recollection,
24 too.

25 THE COURT: That concludes what the defense